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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 00-244
Definition of Radio Markets	)	

To: The Commission

COMMENTS OF COX RADIO, INC.

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SUMMARY

Cox Radio, Inc. ("Cox") and its wholly-owned subsidiaries own and operate over eighty AM and FM radio stations throughout the United States. Accordingly, Cox has a significant interest in the Commission's proceeding regarding proposed revisions to the current methodology for defining radio markets.

Cox respectfully urges the Commission to retain its current methodology for defining radio markets for purposes of its local radio ownership rules. Revising the current methodology would exceed the scope of the Commission's authority and contravene Congressional intent. Only by retaining the current radio market definitions can the Commission serve the statutory scheme. Furthermore, restricting consolidation of the radio industry at this point would be detrimental to the public interest and result in anti-competitive effects. Given the Commission's scarce resources, the Commission should defer to the Department of Justice, the Federal Trade Commission, and state antitrust agencies for antitrust review of radio ownership combinations.

If the Commission decides to modify the definition of radio markets, the Commission should not adopt Arbitron radio metro markets as a proxy for radio markets. Arbitron provides an inappropriate measure of radio markets because Arbitron radio metro markets include only approximately 27% of the counties in the United States. Adoption of Arbitron radio metro markets would lead to yet another inconsistency because the Commission would need to apply a different definition of radio markets for ownership combinations located in the 73% of counties that are not covered by Arbitron. Arbitron radio metro markets are an inaccurate reflection of the actual radio options available to listeners in a market and would reflect a skewed view of the market in circumstances where there are smaller communities near metropolitan areas.

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To: The Commission

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Cox Radio, Inc. ("Cox"), by its attorneys, hereby respectfully submits its Comments in response to the Commission's *Notice of Proposed Rule Making*[1] regarding the definition of radio markets. Cox, either directly or through wholly-owned subsidiaries, owns and operates over eighty AM and FM radio stations throughout the United States, and thus has a significant interest in this proceeding.

In the *Notice*, the Commission proposes to revise its current methodology for defining radio markets for purposes of its local radio ownership rules to restrict further consolidation in the broadcast industry. Cox respectfully urges the Commission to retain the current measure of defining a radio market. As discussed herein, revising the current radio market definitions would exceed the scope of the Commission's authority and would result in none of the intended public interest benefits of fostering competition or diversity. Only by retaining the current methodology will Congress's statutory scheme be preserved. If the Commission does consider modifying the

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[1] *In the Matter of Definition of Radio Markets, Notice of Proposed Rule Making*, MM Docket 00-244, FCC 00-427 (rel. Dec. 13, 2000) ("*Notice*").

definition of radio markets, however, Cox submits that the proposed use of Arbitron radio metro market definitions would be an inappropriate and inadequate proxy for the current methodology.

I. REVISING THE RADIO MARKET DEFINITION IS BEYOND THE SCOPE OF THE COMMISSION'S AUTHORITY.

There is no basis either in statute or precedent for the Commission to alter its method for defining radio markets. The Commission has applied its current radio market definition since 1992, when the Commission relaxed the radio ownership restrictions. In 1996, with the passage of the Telecommunications Act of 1996 ("Telecom Act"),[2] Congress directed the Commission to revise its rules to increase the number of radio stations that could be owned by a single entity in a local area. There is no indication in the Telecom Act or its legislative history, however, that Congress intended that the Commission alter its methodology for defining a radio market. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'"[3] Thus, when using the term "radio market" in the Telecom Act, Congress could have only intended to incorporate the Commission's definition of radio markets that was in effect at the time.

Furthermore, before Congress could make the decision to increase the number of radio stations that could be owned in a market, it would have had to be cognizant of the market definition that would act as the baseline. It would be illogical to assume that Congress intended to increase the number of radio stations that could be owned in a market but did not expect the

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[3] *CFTC v. Schor*, 478 U.S. 833, 845 (1986) (*quoting NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)).

market measure to remain constant. Otherwise, Congress's decision to increase the number of radio stations that an entity could own would be meaningless if the Commission could alter the baseline by redefining the measure of a radio market. In the absence of any definition set forth in the Telecom Act, Congress could only have intended that the definition in effect at the time would continue in force.

As an administrative agency, the Commission may not ignore the specific dictates of a statute and must enforce the statute as written.[4] As stated, Congress could only have intended that the Telecom Act would incorporate the definition of radio markets that was in effect at the time. In light of the above, the Commission holds the burden of justifying its authority to revise the definition of a key term of the Telecom Act.

II. THE STATUTORY SCHEME CAN ONLY BE SERVED BY RETAINING THE CURRENT DEFINITION OF RADIO MARKETS.

A. Congress Intended To Permit Additional Consolidation Of The Radio Industry.

In the *Notice*, the Commission expresses concern that the current radio market definitions "may frustrate the structure of the statute" and cites examples of perceived anomalies as a basis for revising the radio market definition.[5] To the contrary, the Commission's current radio market definition supports the structure of the statute. As stated previously, Congress must have been aware of the Commission's definition of radio markets and approved of the definition when it enacted the Telecom Act. As such, only retaining the current radio market definitions would further Congress's objectives and statutory scheme.

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4 *See Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1361 (D.C. Cir. 1988).

5 *Notice* at ¶¶ 5, 8.

The Commission appears to be attempting to revise the rules primarily to restrict further consolidation in order to assuage fears that there has been too much consolidation in the radio industry. Yet, this consolidation is consistent with the Telecom Act and is hardly a surprise to Congress. By passing the Telecom Act, Congress intended to decrease the level of governmental regulation and artificial constraints on broadcast ownership. It was well-known prior to passage of the Telecom Act that there had been a substantial amount of consolidation in the industry since the Commission relaxed its radio ownership rules in 1992.[6] As a result, Congress must have realized that by relaxing the ownership restrictions, further consolidation would be likely to occur. The Commission's goal of restricting consolidation runs contrary to the policy decision made by Congress in 1996 that the public interest would benefit from the relaxation of the local radio ownership rules and that the resulting levels of diversity and competition would be appropriate. By revising the definition of radio markets to restrict further consolidation in the radio industry, and, in effect, amending Section 202(b)(1) of the Telecom Act, the Commission itself would be circumventing the statutory scheme.

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[6] The consolidation of the radio industry after the Commission revised its radio regulations in 1992 was well-publicized. *See, e.g., Radio Stocks Rise as Limits On Owners Ebb*, THE NEW YORK TIMES, Dec. 25, 1995, at p. 53 ("Predicting a post-deregulation growth spurt for radio companies seems safe. When ownership rules eased in 1992, allowing radio companies to rise to the present limit, an earlier round of station-swapping took place"); Tony Sanders, *Transaction Digest*, RADIO BUSINESS REPORT, Nov. 27, 1995, at p. 16 (regularly published article reporting recent radio transactions); *Acquisitions Spur Stock Price Growth for Public Radio Groups*, RADIO BUSINESS REPORT, Oct. 16, 1995, at p. 14 (discussing recent radio acquisitions). After Congress passed the Telecom Act, the press predicted further consolidation. *See, e.g., From Duop to Dereg: House, Senate Usher In a New Era for Radio*, RADIO BUSINESS REPORT, Feb. 5, 1996, at pp. 2, 4 ("Last Thursday, the House and Senate passed a telecommunications bill that will usher in sweeping ownership deregulation of the radio industry." "RBR observation:... Under the just-passed legislation, there will be fewer owners."); Jonathan Tasini, *The Tele-Barons; Media Moguls Rewrite the Law and Rewire the Country*, THE WASHINGTON POST, Feb. 4, 1996, at p. C01 (The bill "will almost surely set off a new wave of mergers and alliances.").

B. The Perceived Anomalies Are Consistent With The Statute.

The Commission's rationale that the "anomalies" cited in the *Notice* are subverting the statutory scheme is flawed because it is based on incorrect assumptions. The *Notice* cites examples of ownership combinations in Wichita, Kansas, and Youngstown, Ohio, as anomalies that subvert the statutory scheme because the number of radio stations in the market as defined by Arbitron is smaller than the number of radio stations in the market as defined using the Commission's longstanding radio market measure. The Commission is erroneously and arbitrarily accepting Arbitron's definition as the standard by which it should measure the ideal outcome of an application of the radio ownership rules. In fact, there is no reason to assume that Arbitron radio metro markets should be the standard by which radio ownership should be measured. The Telecom Act did not adopt the Arbitron radio metro market definition, and as discussed below, Arbitron radio metro markets are wholly inappropriate measures of radio markets. As a result, it would be incorrect to assume that if the current radio market definition permits more consolidation than the Arbitron market definition would permit, the result is contrary to statutory intent and the public interest. The opposite is true. By passing the Telecom Act, Congress intended to relax the local ownership rules, and the results in Wichita and Youngstown are consistent with the statute and far from anomalous.

Even if it were true that the current radio market definition results in a few anomalies, the Commission should not attempt to cure the few anomalies by changing the general rule. Rather than permitting the exceptions to drive the rule, the Commission should remember that the current radio market definition has served the public interest well. It would be unwise to revise the radio market definition due to rare instances of perceived anomalies, and it would be naive to believe that any other radio market definition would not produce its own anomalies. Assuming,

arguendo, that the current radio market definition should be revised, in doing so, the Commission would simply be substituting one set of anomalies for a new, possibly worse, set of anomalies.

III. RESTRICTING FURTHER CONSOLIDATION WOULD NOT BENEFIT THE PUBLIC INTEREST.

The Commission erroneously assumes that restricting further consolidation would foster competition and benefit the public interest. If the definition of radio markets is revised to shrink the size of a market and thereby restrict common ownership of radio stations, the Commission essentially would be preserving the status quo, which would result in unintended, anti-competitive effects. The current dominant radio station owners in the market would continue to enjoy the economic efficiencies stemming from the common ownership of radio stations, and the smaller radio station group owners would be restricted from acquiring as many radio stations in a market as the previous radio market definition would have permitted. As a result, smaller radio station owners will be disadvantaged (to the benefit of larger radio station groups) and would be prevented by the revised market definition from "catching up." Accordingly, revising the definition of radio markets to restrict common ownership of radio stations would result in long-term, anti-competitive effects.

IV. THE DEPARTMENT OF JUSTICE, THE FEDERAL TRADE COMMISSION, AND STATE ANTITRUST AGENCIES PROTECT THE PUBLIC FROM ANTITRUST CONCERNS.

The Commission indicates that one of its goals in restricting further consolidation in the radio industry is to prevent anti-competitive harms in the marketplace.[7] The Commission, however, does not need to focus its efforts on antitrust concerns. The Department of Justice, the Federal Trade Commission, and state antitrust agencies continually monitor proposed

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[7] *1998 Biennial Regulatory Review, Notice of Inquiry*, 5 FCC Rcd 11276, ¶ 20 (1998).

transactions, including those that involve radio stations, and review those that raise antitrust concerns. For instance, the Department of Justice has reviewed proposed transactions involving Clear Channel Communications for antitrust concerns.[8] To conduct its own antitrust review is simply an unnecessary duplication of effort. Given the Commission's scarce resources, the Commission should defer to the Department of Justice, the Federal Trade Commission, and state antitrust agencies regarding antitrust concerns in the radio industry.

V. ARBITRON MARKET DEFINITIONS ARE AN INADEQUATE PROXY FOR RADIO MARKETS.

If the Commission decides to modify the radio market definitions in spite of the foregoing, Arbitron radio metro markets would be a wholly inadequate proxy for defining radio markets. Arbitron is "an international media research firm providing information services that are used to develop the local marketing strategies of the electronic media, and of their advertisers and agencies."[9] In the *Revision of Radio Rules and Policies* proceeding in 1992, the Commission initially decided to use Arbitron radio metro markets as its measure of radio markets. Upon reconsideration, however, the Commission realized the flaws of the Arbitron radio metro market definition and wisely rejected the use of Arbitron. In its place, the Commission adopted the current radio market definition, and the reasoning behind the Commission's rejection of Arbitron continues to apply today. Not only is Arbitron a commercial service whose goals do not necessarily coincide with those of the Commission or the public

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[8] *DOJ Proposes Final Judgment in Radio Station Merger*, ANTITRUST LITIGATION REPORTER, Jan. 2001, at p.5; *DOJ Requires Clear Channel and AMFM to Divest 99 Radio Stations, Advertising Company, To Proceed with Merger*, ANTITRUST REPORT, July/Aug. 2000, at p.11; *Cumulus and Clear Channel Agree to Amended Station Swap and Additional Sales to Clear Channel*, BUSINESS WIRE, July 25, 2000.

[9] *About Arbitron* (last visited Feb. 26, 2001) <http://www.arbitron.com/aa.htm>.

interest, but also Arbitron radio metro markets do not adequately reflect stations' signal coverage area and the diversity and voices available in any particular market.[10]

As the Commission states in the *Notice*, Arbitron radio metro markets include slightly less than 850 out of 3,100 counties in the United States and almost 80% of the population. Thus, Arbitron radio metro markets only cover approximately 27% of all the counties in the United States. More than 2,250 counties (about 73% of the counties) and more than 20% of the population in the United States *do not* belong to an Arbitron market.[11] Commissioners Ness and Tristani noted in 1998 that "[a]pproximately *half* of all radio stations are located *outside* of Arbitron-rated markets in communities with populations of 50,000 or less."[12] As a result, even if the Commission were to adopt Arbitron radio market definitions, it would need to adopt an alternate radio market definition to address radio ownership combinations located in the numerous counties that are not covered by Arbitron. The Commission would be faced with yet another inconsistency in its rules because it would be forced to evaluate a proposed transaction in an Arbitron market under a different radio market definition than a proposed transaction in a non-Arbitron market. Furthermore, the markets that Arbitron does not cover are smaller markets that are more likely to raise anti-competitive concerns. Arbitron radio metro markets are clearly an inadequate alternative to the current standard.

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10 *Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387, ¶¶ 39-40 (1992).

11 *See Notice* at ¶ 10. In contrast, Nielsen Media Research's Designated Market Areas ("DMAs"), which were adopted as a measure of a market in the local television ownership rules, "cover the entire continental United States, Hawaii and parts of Alaska." *FAQs - About DMA's & Direct Broadcast Satellite (DBS) Providers* (last visited Feb. 26, 2001) <http://www.nielsenmedia.com/FAQ/>.

12 "Joint Statement of Commissioners Susan Ness and Gloria Tristani," *KIXK, Inc.*, 13 FCC Rcd 15685 (1998) (emphasis added).

Even for those counties that are covered by Arbitron, the use of the Arbitron radio metro markets would not further the Commission's goal of ensuring that a diversity of voices is available to listeners in the market. Ideally, the radio market definition should reflect the actual number of radio stations that listeners in any one area can hear in order to provide an accurate measure of the diversity available to listeners. Arbitron radio markets are unable to meet this criteria in a number of respects. First, Arbitron delineates radio markets along county lines rather than actual signal coverage of stations and thus presents an inaccurate reflection of the actual number of radio stations that can be heard in a market. Second, Arbitron would be an unduly restrictive measure of the number of stations in a market. The Commission has previously stated that its use of the 3.16 mV/m contour for FM stations and the 5 mV/m contour for AM stations to measure principal community coverage may undercount the number of stations that can be heard in a market.[13] It is likely that using Arbitron will result in further undercounting the number of stations that can be heard in a market. As such, it is inferior to the current measure of markets in terms of an accurate reflection of the stations that may be heard in the market. Third, as the Commission has previously noted, Arbitron excludes stations that fail to meet certain minimum criteria from its count of stations in a market.[14] As a result, stations that serve limited or specialized audiences and foster diversity would not be counted "even

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13 *Revision of Radio Rules and Policies*, *Report and Order*, 7 FCC Rcd 2755, ¶ 46 (1992).

14 *Id.* at ¶¶ 38, 40; *Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387, ¶ 40 (1992). A station must meet "Minimum Reporting Standards" to be included in the Arbitron Radio Market Report. The Arbitron Radio Market includes the Metro Survey Area, the Total Survey Area, the Designated Market Area, and the Full Survey Area. *Description of Methodology*, (last visited Feb. 26, 2001) <http://www.arbitron.com/studies/p1/p1meth.htm>.

though these stations are often significant factors in maintaining both competition and viewpoint diversity in particular markets."[15]

The use of Arbitron markets also would reflect a skewed view of the market in circumstances where there are smaller communities near metropolitan areas. In those instances, Arbitron may not include within the community's radio metro market those stations that are broadcasting in the nearby metropolitan area that listeners in the community would be able to hear. For example, Arbitron designates Frederick, Maryland as a separate Arbitron market from Washington, DC.[16] According to Arbitron, the Frederick, Maryland market includes only ten commercial AM or FM stations. It is likely, however, that persons in Frederick, Maryland are able to listen to some of the radio stations that are included in the Washington, DC radio metro market, which includes a total of fifty radio stations. This is one more example of the many ways in which Arbitron radio metro markets would be inappropriate to use as definitions of radio markets.

The Commission's proposal to use Arbitron market definitions loses sight of the rationale and basis for the current market definition standard. In rejecting the use of Arbitron markets in 1992, the Commission was "convinced by petitioners' arguments that this revised measure [the current definition of radio markets] will reflect the actual options available to listeners and will reflect market conditions facing the particular stations in question."[17] Because Arbitron markets

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15 *Revision of Radio Rules and Policies, Report and Order*, 7 FCC Rcd 2755, ¶ 45 (1992).

16 BIA RESEARCH, INC., INVESTING IN RADIO 2000 MARKET REPORT, Table 2 (1st ed. 2000).

17 *Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd 6387, ¶ 10 (1992).

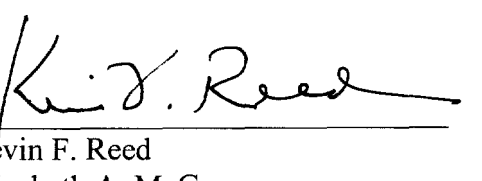
still do not reflect actual listening and market conditions, they remain an inadequate measure of radio station markets.

CONCLUSION

The Commission's decision in this rulemaking must reflect a careful consideration of the scope of the agency's authority and the implications of the Commission's decision on the public interest concerns of competition and diversity. Cox respectfully submits that a decision to revise the definition of radio markets would exceed the scope of the Commission's authority and would not provide the public interest benefits sought by the Commission. Instead, for the reasons stated herein, Cox respectfully urges the Commission to retain its current definition of radio markets, thereby preserving Congress's policy objectives and ensuring the continued benefits to the public interest.

Respectfully submitted,

COX RADIO, INC.

By: 

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